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**No. 97-7164**

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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

**FRANCOIS HOLLOWAY,**  
also known as ABU ALI,

*Petitioner,*

v.

**UNITED STATES OF AMERICA,**

*Respondent.*

*ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT*

**BRIEF OF AMICUS CURIAE  
NATIONAL ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS**

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**BRIEF OF AMICUS CURIAE  
NATIONAL ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS  
IN SUPPORT OF PETITIONER**

---

This brief *amicus curiae* is submitted in support of  
Petitioner Francois Holloway. By letters filed with the

Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief.<sup>1</sup>

### INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 9,000 attorneys and 28,000 affiliate members, including representatives from all fifty states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner.

Among NACDL's stated objectives is the

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<sup>1</sup> As required by Rule 37.6 of this Court, *amicus curiae* submits the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

promotion of the proper administration of criminal justice, which includes the construction of statutes consistent with their unambiguous terms, and therefore in a manner that can be predicted accurately not only by persons subject to enforcement, but also by those who enforce the laws.

As a result, NACDL, consistent with its mission, files this brief *amicus curiae* in support of petitioner's claim that the Court of Appeals erred in permitting petitioner's conviction based on a "conditional intent" that is not anywhere described in the statute under which he was charged.

### STATEMENT

*Amicus* adopts petitioner's statement of the case.

### SUMMARY OF ARGUMENT

This case presents an issue of fundamental importance to the administration of the criminal justice system: whether unambiguous language defines the parameters of a federal criminal statute, or whether courts, in the guise of divining legislative "purpose" or "intent," and by resort to legislative history and other extra-statutory sources, are permitted to substitute their version of what they believe should be the ambit of the statute.

Obviously, the latter form of statutory construction portends grave repercussions for not only the doctrine of

separation of powers, but also the protection afforded by the Due Process clause of the Fifth Amendment to the United States Constitution. Judicial expansion of the scope of a statute usurps the function of the legislature and renders criminal laws so flexible as to preclude advance understanding by persons subject to the law, as well as by those charged with enforcement responsibility.

Here, the federal carjacking statute, 18 U.S.C. §2119, contains a specific intent provision requiring that the government establish a defendant's "intent to cause death or serious bodily harm." However, the Court of Appeals below determined that the plain language of the statute would narrow its application too substantially, and, as a result, engrafted on the statute a "conditional intent" element in satisfaction of the specific intent requirement.

In so doing, the Court of Appeals eschewed the rules of statutory construction, and appropriated for the judiciary the exclusive province of the legislature. The Court of Appeals' decision also perpetuated a conflict among the Circuit Courts of Appeal with respect to whether a "conditional intent" to "cause death or serious bodily harm" is sufficient under 18 U.S.C. §2119.

As detailed below, the decisions premising convictions under §2119 on a defendant's "conditional intent" contravene the clear language of the statute, violate the principles of statutory construction developed by this Court, and represent, ultimately, those courts' replacement

of the legislature's enactment with one created by the judiciary on an *ad hoc* basis.

Moreover, in so doing, the courts that have allowed "conditional intent" to suffice have found legislative "intent" where none exists, have misapplied purportedly analogous caselaw, and have incorporated by unsupported inference provisions in §2119 that were *explicit* in the other statutes referred to by comparison.

Thus, not only is the inclusion of "conditional intent" in §2119 an invalid exercise of judicial authority, but the methodology employed to achieve that inappropriate objective is fatally flawed.

Accordingly, *amicus* respectfully submits that the decision of the United States Court of Appeals for the Second Circuit should be reversed, and Petitioner's conviction vacated.

## ARGUMENT

### I. THE COURT BELOW ERRED IN HOLDING THAT THE DEFENDANT'S "CONDITIONAL INTENT" TO "CAUSE DEATH OR SERIOUS BODILY HARM" SATISFIED THE SPECIFIC INTENT ELEMENT WITHIN 18 U.S.C. §2119

#### A. *The Canons of Statutory Construction*

This Court has often repeated that examination of a statute

begin[s] with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself.

*Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

In that context, as this Court has instructed, "absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.*

In addition, this Court has explained that when it "find[s] the terms of a statute unambiguous, judicial inquiry is complete, except 'in rare and exceptional circumstances.'" *Rubin v. United States*, 449 U.S. 424, 430

(1981) (citations omitted).

#### B. *The Plain Language of 18 U.S.C. §2119*

Here, the amended version of 18 U.S.C. §2119 (that was in effect when the offense charged below was committed) provides that:

Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall –

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or

imprisoned not more than 25 years,  
or both, and

(3) if death results, be fined under  
this title or imprisoned for any  
number of years up to life, or both,  
or sentenced to death.

18 U.S.C. § 2119 (1997) (emphasis added).

That language requires that the defendant possess specific "intent to cause death or serious bodily harm." *United States v. Randolph*, 93 F.3d 656, 661 (9<sup>th</sup> Cir. 1996). In *Randolph, supra*, the Ninth Circuit, relying on that language, held that the specific intent element was *not* satisfied by a defendant's mere "conditional intent," *i.e.*, the intent to cause the requisite harm only if the occupant of the vehicle resists. 93 F.3d at 665. See also *United States v. Craft*, \_\_\_ F. Supp. \_\_\_ 1996 WL 745527 (E.D. Pa. 1996) (since "[t]he language of the statute is explicit[,] the "conditional intent" approach advanced by the government was rejected).<sup>2</sup>

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<sup>2</sup> In the Second Circuit below in this case, Judge Miner dissented, and opted to follow *Randolph*, because he "perceive[d] no basis in the plain language of the statute or in the legislative history for an element of conditional intent in the crime under examination here." *United States v. Arnold (Holloway)*, 126 F.3d 82, 90 (2d Cir. 1997) (Miner, J., *dissenting*).

**C. *The Conflict In the Circuits Over Whether  
"Conditional Intent" Is Sufficient Under §2119***

Nevertheless, while not disputing that §2119 is a specific intent crime, three other Circuit Courts of Appeals, including the Second Circuit below in this case, have found that a defendant's "conditional intent" can suffice. See *United States v. Arnold (Holloway)*, 126 F.3d 82, 85-89 (2d Cir. 1997); *United States v. Romero*, 122 F.3d 1334, 1338-39 (10<sup>th</sup> Cir. 1997); *United States v. Anderson*, 108 F.3d 478, 481-85 (3d Cir. 1997).

In so doing, those courts eagerly looked beyond the language of the statute, the plain terms of the provision notwithstanding. For example, in *Anderson*, without first finding any ambiguity in the statutory language itself, the Third Circuit contended that "[a] review of the legislative history and development of the carjacking statute is critical in determining which court's interpretation of the intent provision of the carjacking statute this Court should adopt." 108 F.3d at 481.<sup>3</sup>

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<sup>3</sup> The divergent courts to which the Third Circuit was referring in *Anderson* were the Ninth Circuit in *Randolph, supra*, versus the District Court below in this case, and the District Court in *United States v. Norwood*, 948 F. Supp. 374 (D.N.J. 1996) (which had adopted the rationale of the District Court in this case). However, the result may have been a foregone conclusion since the District Court in *Norwood*, sitting by designation, authored

Similarly, in *Arnold (Holloway)*, the Second Circuit below, again without first locating any ambiguity in the statutory language, embarked on a detailed examination of the history of the 1994 amendments to §2119 in order to ascertain the legislative purpose underlying those changes. 126 F.3d at 85-86.

That effort reduced the courts' analysis to pure guesswork, as demonstrated by the equivocal conclusions they reached. For instance, in *Anderson, supra*, in seeking to determine Congressional intent, the Third Circuit couched its discussion with qualifiers such as, "presumably" why Congress added the specific intent provision, and what Congress "apparently intended" by adding the new intent requirement. 108 F.3d at 482.

Likewise, below, the Second Circuit surmised that that the inclusion of the specific intent requirement was "in all likelihood[] an unintended drafting error." 126 F.3d at 86 (citations omitted).<sup>4</sup>

Moreover, the District Court's opinion below

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the Third Circuit's opinion in *Anderson*.

<sup>4</sup> The District Court below also hedged its conclusion: "perhaps" the specific intent requirement was added due to the addition of a death sentence for the offense. *United States v. Holloway*, 921 F. Supp. 155, 158 (E.D.N.Y. 1996).

maintained, based on the legislative history and remarks by individual legislators, that

carelessness in the legislative process has produced a criminal statute that says something fundamentally different than what Congress obviously meant to say.

*United States v. Holloway*, 921 F. Supp. 155, 156 (E.D.N.Y. 1996).<sup>5</sup>

The District Court also asserted that in enacting the 1994 amendments Congress "*inadvertently* closed [the door to carjacking prosecutions] substantially by *unintentionally* imposing the specific intent requirement on the entire statute, not just in death penalty cases." 921 F. Supp. at 159 (emphasis added).

In permitting "conditional intent" to satisfy the specific intent element of §2119, these courts were candid in attributing their motivation: they simply preferred *their* interpretation, which they believe reflected Congress's intent, to the plain language of the statute.

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<sup>5</sup> Of course, the District Court did not explain why, if the statute is so dramatically different from what Congress intended, it has not been amended despite three attempts to do so. See *Arnold, supra*, 126 F.3d at 91 (Miner, J., *dissenting*).

In *Anderson, supra*, the Third Circuit, citing the District Court's opinion below here, remarked that unless "conditional intent" were permitted to satisfy the specific intent requirement, the result would be to

drastically narrow the application of the carjacking statute, when, in fact, the legislative history reveals that the intent element should not have even been added as an element of the substantive offenses at all.

108 F.3d at 483. See also *United States v. Arnold (Holloway), supra*, 126 F.3d at 88; *United States v. Holloway, supra*, 921 F. Supp. at 159.<sup>6</sup>

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<sup>6</sup> In *Anderson*, the Third Circuit rejected the Ninth Circuit's conclusion in *Randolph* not because *Randolph* was in conflict with the statutory language, but because *Randolph* "directly contravene[d] the intent of Congress to broaden the application of the carjacking statute by the inclusion of the 1994 amendments." 108 F.3d at 483.

**D. The Creation of "Conditional Intent" In §2119 Violated the Rules of Statutory Construction and Invaded the Exclusive Province of the Legislature**

Thus, the Second and Third Circuits, following the decision of the District Court below in this case,<sup>7</sup> dispensed with the unambiguous provisions of the statute in favor of a judicially created "conditional intent" element that purportedly implemented the unstated will of Congress.

Indeed, while the Second Circuit below claimed that it "decline[d] any invitation to redraft the statute[.]" *Arnold (Holloway)*, 126 F.3d at 86, the dissent by Judge Miner correctly replies that "that in fact is what [it] ha[s] done here." 126 F.3d at 92 (Miner, J., dissenting).

That judicial expansion of an unambiguous statute, based ostensibly on "legislative purpose," constitutes precisely the type of speculation that this Court has consistently prohibited.

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<sup>7</sup> The Tenth Circuit, in *United States v. Romero, supra*, adopted the Third Circuit's conclusions in *Anderson*. 122 F.3d at 1338-39. The Tenth Circuit also stated that "conditional intent" was sufficient because under §2119 the taking of the vehicle could be accomplished by "intimidation." 122 F.3d at 1338-39. However, in *Randolph, supra*, the Ninth Circuit pointed out that such a construction "would be to make surplusage of the intent element." 93 F.3d at 665 & n. 6.

As this Court stated in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 98 (1991), “[t]he best evidence of [legislative] purpose is the statutory text adopted by both Houses of Congress and submitted to the President.”

In fact, *Casey* involved a closely analogous situation, in which it was also argued that an omission from a statute (42 U.S.C. §1988) created unintended consequences inconsistent with similar legislation. As this Court noted, “the argument runs, the 94<sup>th</sup> Congress simply forgot; it is our duty to ask how they would have decided had they actually considered the question.” 499 U.S. at 100 (citation omitted).

However, this Court cautioned that “[t]his argument profoundly mistakes [the Court’s] role.” *Id.* Instead, this Court explained that when statutory language is *not* ambiguous,

it is not [the Court’s] function to eliminate clearly expressed inconsistency of policy and to treat alike subjects that different Congresses have chosen to treat differently. The facile attribution of congressional “forgetfulness” cannot justify such a usurpation.

499 U.S. at 101.

That principle applies with equal force to complaints about a “careless” Congress, since the source of the judicial dissatisfaction is the same: the statute does not state what the court believes it ought (or meant) to state. Indeed, the government’s position here corresponds exactly with its position in *Iselin v. United States*, 270 U.S. 245 (1926), in which the statutory language, as here, was “plain and unambiguous,” 270 U.S. at 250.

Responding to the government’s arguments in *Iselin*, this Court pointed out that

[w]hat the government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope.

270 U.S. at 251.

Nevertheless, ultimately, as this Court declared, “[t]o supply omissions transcends the judicial function.” *Id.* (citations omitted). That is a legislative responsibility exclusively, and to allow the courts to assume that function offends two fundamental constitutional tenets: separation of powers, and Due Process. See *United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., joined by Kennedy, J. and Thomas, J., *concurring*).

Indeed, it is impossible for those who enforce the law, and those who are subject to its proscriptions, to know what is proscribed if the plain language of a statute can be superseded by a subsequent judicial extrapolation of legislative history and "purpose."<sup>8</sup>

That makes a mockery of the Due Process guarantee of adequate notice, as Justice Scalia's concurring opinion in *R.L.C.* pointed out:

[i]t may well be true that in most cases the proposition that the words of the United States Code or the Statutes at Large give adequate notice to the citizen is something of a fiction [citation omitted], albeit one required in any system of law; but necessary fiction descends to needless farce when the public is charged even with knowledge of Committee Reports.

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<sup>8</sup> In fact, allowing "conditional intent" does not resolve any ambiguity in §2119, but breeds one where it would not otherwise exist. The notion of "conditional intent" introduces gradations of time and distance, as well as additional subjective criteria, that would render the intent provision far more complicated and indeterminable. See, e.g. *Arnold, supra*, 126 F.3d at 89 n. 4. Cf. *United States v. Arrellano*, 812 F.2d 1209, 1212 (9<sup>th</sup> Cir. 1987).

503 U.S. at 309.

Judicially crafted legislation also eviscerates the legislature's primacy in the field of enacting criminal laws. As Justice Scalia's concurring opinion in *R.L.C.* notes,

"because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity."

*Id.* (Scalia, J., joined by Kennedy, J. and Thomas, J., concurring) (quoting *United States v. Bass*, 404 U.S. 336, 348 (1971) (other citations omitted)).

It also intrudes upon state jurisdiction over criminal prosecutions since, as the dissent below notes, "carjacking is essentially a state offense, and it may well be the intent of Congress to limit the scope of the federal offense." 126 F.3d at 91 (Miner, J., dissenting) (citation omitted). Thus, comity considerations are implicated as well. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (holding unconstitutional on commerce clause grounds federal statute prohibiting schoolyard possession of gun).

**E. The Reasons Cited By the Courts Below Fail to Justify the "Conditional Intent" Element**

Nor are the justifications cited by the Circuit courts sufficient to overcome these essential principles. For example, even though allowing "conditional intent" to satisfy the statute would extend its reach to conduct of similar methodology and seriousness, *see United States v. Holloway, supra*, 921 F. Supp. at 159; *United States v. Arnold (Holloway), supra*, 126 F.3d at 86, 88; *United States v. Anderson, supra*, 108 F.3d at 484, that is not a valid basis for ignoring §2119's plain language.

Indeed, that principle is almost as old as the republic itself, and dates back to Chief Justice Marshall's opinion in *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820):

[t]o determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, *so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.*

18 U.S. (5 Wheat.) at 96 (emphasis added).

The statements of individual legislators, even the sponsors of the 1994 amendments to §2119, are also unavailing. As this Court has repeatedly instructed, when a statute

contains a phrase that is unambiguous – that has a clearly accepted meaning in both legislative and judicial practice – we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.

*Casey, supra*, 499 U.S. at 98-99. *See also Consumer Product Safety Commission, supra*, 447 U.S. at 118 ("ordinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history").

**F. Even If Relevant, the Legislative History Does Not Support the "Conditional Intent" Element**

Moreover, even if the legislative history were relevant, there is not any basis for concluding that Congress intended the specific intent element to be diluted by permitting "conditional intent" to suffice. As noted in

the dissent below, Congress has had three opportunities to "correct" the "inadvertent" inclusion of the specific intent requirement in the 1994 amendments, and three times Congress has declined to pass amendments designed to achieve that objective. See *United States v. Arnold (Holloway)*, *supra*, 126 F.3d at 91 (Miner, J., *dissenting*).

That Congressional refusal to amend §2119 further is at least as powerful, if not more powerful, a manifestation of Congress's intent as anything cited in support of the concept of "conditional intent."

In addition, the Second Circuit's reference to state statutory schemes that have codified "conditional intent" merely proves the point: "*conditional intent*" is expressly permitted by statute in those jurisdictions. See *Arnold (Holloway)*, *supra*, 126 F.3d at 88 (citing criminal codes of Delaware, Pennsylvania, and Hawaii).

As the dissent below noted, there is not any such corresponding provision in the federal criminal code, or any provision of the United States Code that authorizes "conditional intent," and there does not exist any federal common law of crimes. *Arnold (Holloway)*, *supra*, 126 F.3d at 92 (Miner, J., *dissenting*).<sup>9</sup>

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<sup>9</sup> The dissent also noted that while the majority opinion relied in part on the Model Penal Code (as did the District Court as well, 921 F. Supp. at 160), the Code "has never been adopted by Congress." 126 F.3d at 92 (Miner,

### G. *The Cases Cited In Support of Including "Conditional Intent" In §2119 Are Inapposite*

Also, the cases cited by the courts that have adopted "conditional intent" as part of §2119 are inapposite. For instance, *United States v. Marks*, 29 M.J. 1 (C.M.A.1989), involved a *general* intent crime, aggravated arson. Similarly, in *Shaffer v. United States*, 308 F.2d 654 (5<sup>th</sup> Cir. 1962), the Court's analysis was performed in the context of an *objective* standard, relying in part on the victim's reasonable perceptions, and not with respect to a defendant's *specific* intent.

In *United States v. Dworken*, 855 F.2d 12, 18-19 (1<sup>st</sup> Cir. 1988), the analysis was in the context of a conspiracy charge, and *unconsummated offenses*. Also, in *Dworken* the First Circuit pointed out that the defendant clearly wanted the condition (a successful negotiation of a marijuana transaction) to obtain, and "had every reason to believe that there was a reasonable likelihood that he would realize his goal." 855 F.2d at 19.

That is completely unrelated to the circumstances present here, as is the burglary analogy set forth in *United States v. Arrellano*, 812 F.2d 1209, 1212 n. 2 (9<sup>th</sup> Cir. 1987), in which the burglar's intent to rape is frustrated by the fact that the dwelling is empty. In that situation, the burglar possesses an *unconditional* intent to commit the

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J., *dissenting*).

felony (rape of the occupant); the condition that is unfulfilled is not the offender's *intent*, but rather the presence of the victim. Thus, it is only the completion of the underlying offense, and not the defendant's intent (nor his liability for burglary) that is contingent on any subsequent circumstance or event.

Here, it is the defendant's *intent* itself that is conditional. Such a standard of intent is absent from §2119, and from the United States Code. The language of the statute, therefore, could not be plainer. Consequently, the resort to legislative history was inappropriate, and, even if it was not, the legislative history does not support the conclusion that Congress intended "conditional intent" to suffice.

It is respectfully submitted that re-drafting of statutes by the courts seriously threatens the fundamental principles of separation of powers and Due Process. If unambiguous laws are subject to judicial enlargement, there cannot be any certainty as to their meaning, and/or their enforcement. That defeats the very purpose of legislation, and Congress's constitutional mandate. In order to preserve these basic values of the criminal justice and constitutional system, it is respectfully submitted that the Second Circuit's decision below must be reversed.

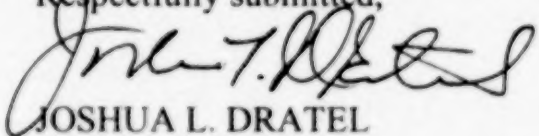
## CONCLUSION

Accordingly, for the reasons set forth above, as well as for those set forth in Petitioner's Brief, it is respectfully submitted that the decision of the United States Court of Appeals for the Second Circuit should be reversed, and petitioner's conviction vacated.

Dated: 2 July 1998

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Respectfully submitted,



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